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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARK OLLA,

Cross-Defendant and Appellant,

v.

ROBERT H. WAGNER et al.,

Cross-Complainants and
Respondents.

B247598

(Los Angeles County
Super. Ct. No. BC404894)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Joseph R. Kalin, Judge. Affirmed.

Mark Olla, in pro. per., for Cross-Defendant and Appellant.

Geraci Law Firm, Gregory M. Lee for Cross-Complainants and Respondents.

INTRODUCTION

Plaintiff, cross-defendant, and appellant Mark Olla (plaintiff) appeals from a judgment on a cross-complaint in favor of defendants, cross-complainants, and respondents (defendants).¹ Plaintiff argues that the trial court erred when it adjudicated certain of his legal defenses against him by giving collateral estoppel effect to an adverse Washington state judgment. Plaintiff also contends that the trial court made various errors at trial, including when it excluded certain evidence and admitted other evidence.

Plaintiff's challenge to the trial court's adjudication of certain of his legal defenses based on collateral estoppel grounds is meritless because our prior opinion in this case upheld the trial court's previous ruling giving collateral estoppel effect to the Washington state judgment. We further hold that the record provided by plaintiff is inadequate to determine his claims concerning other matters that were determined at trial, such as the exclusion and admission of certain evidence. We therefore affirm the judgment on the cross-complaint.

FACTUAL BACKGROUND²

On three separate occasions, plaintiff borrowed money from defendants so he could purchase and move into a residence in the State of Washington (Washington property). The three loans were "bridge loans" secured by the equity in plaintiff's Malibu residence (Malibu property) that allowed plaintiff to purchase the Washington property while he waited for his Malibu property to sell.

¹ Defendants are Robert Wagner, an individual, and Robert Wagner as Trustee for the Robert H. Wagner Money Purchase Pension Plan.

² To provide a factual context for the discussion of defendant's challenges to the judgment on the cross-complaint, the facts are taken from our prior unpublished opinion in this case (case no. B239702), which facts were, in turn, taken from the Washington trial court's findings of fact—findings that were affirmed by the Washington Court of Appeals.

The first loan of \$1,700,000 closed in October 2007 and became due in full in September 2008. The second loan of \$150,000 closed in November 2007 and also became due in full in September 2008. The third loan of \$160,000 closed in March 2008 and it too became due in full in September 2008.

The first loan of \$1,700,000 was secured by a second deed of trust on the Malibu property and a first deed of trust on the Washington property. The second loan of \$150,000 was secured by a third deed of trust on the Malibu property. The third loan of \$160,000 was secured by a fourth deed of trust on the Malibu property. Disclosure statements for the loans explained that they were made to enable plaintiff to purchase, move into, and improve the Washington property and that they would be repaid from the proceeds of the sale of the Malibu property and the refinancing of the Washington property.

Almost immediately after the first loan closed, plaintiff began to experience financial difficulties. As a result, plaintiff failed to make any interest payments to defendants on the three loans beyond interest that had been prepaid from loan proceeds at closing.

In September 2008, the parties began negotiating a settlement. In October 2008, the parties executed a settlement agreement.³ That agreement provided that plaintiff “has not been able to sell or refinance [his] Properties and the value of such Properties, and any other property constituting security for [his] Loans, is less than the sum of the outstanding principal and accrued interest on such Loans. [Plaintiff] desires to resolve the defaults by executing and delivering to [the Wagner Pension Plan], among other things, deeds to the Properties in lieu of foreclosure. In consideration thereof, [plaintiff] is willing to agree not to sue [the Wagner Pension Plan] for any liability arising under the Loan Documents, all on the terms and subject to the conditions set forth more particularly in this Agreement.” In return for the deeds in lieu of foreclosure, defendants agreed to pay plaintiff \$65,000 on the Malibu property and \$100,000 on the Washington property.

³ The parties to the agreement were plaintiff and the Wagner Pension Plan.

The settlement agreement contained a release provision that provided, in pertinent part, that plaintiff “hereby releases and forever discharges [the Wagner Pension Plan], [the Wagner Pension Plan’s] agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which [plaintiff] might now have or claim to have against [the Wagner Pension Plan], whether presently known or unknown, and of every nature and extent whatsoever *on account of or in any way concerning, arising out of or founded on the [the Wagner Pension Plan] Loan documents or the [the Wagner Pension Plan] Loans . . .*” (Italics added.)

PROCEDURAL BACKGROUND⁴

In December 2008, approximately two months after plaintiff executed the settlement agreement, he filed a verified complaint against defendants in the trial court alleging 15 causes of action, *all arising from the bridge loans and the subsequent settlement agreement*. In May 2009, defendants answered the complaint and asserted an affirmative defense alleging that plaintiff’s claims were barred by the “doctrine of release.”

In June 2009, plaintiff filed a verified complaint against the same defendants in Washington. In that complaint, plaintiff alleged that the individual defendant used his superior position as a lender, mortgage broker, and attorney to coerce plaintiff into deeding the Malibu property to defendants to avoid the pending threat of foreclosure. Plaintiff sought rescission of all three bridge loans on the grounds of fraud, deceit, and duress. According to plaintiff, he signed the October 2008 settlement agreement under “abject duress.”

In the Washington trial court, plaintiff moved for an expedited fact finding hearing, which motion the court granted. In its order, the Washington trial court stated,

⁴ The Procedural Background is taken, in part, from our prior opinion in this case (case no. B239702).

“[T]he Court shall issue findings of fact and conclusions of law on the issue of the enforceability of the parties’ settlement agreement.” The issue proceeded to a three-day bench trial at which plaintiff represented himself. In January 2010, the Washington trial court issued findings of fact and conclusions of law. Among other things,⁵ the trial court concluded that “[Plaintiff] has failed to meet his burden of proving all of his remaining claims and causes of action seeking the rescission of the settlement agreement. [¶] *The settlement agreement is therefore valid and fully enforceable in its entirety.* As a result, all of [plaintiff’s] other claims against [defendants] arising out of [defendants’] loans and the subsequent actions of the parties, as described in [plaintiff’s] complaint (including but not limited to breach of contract, fraud, fraudulent or intentional deceit, fraudulent business practices, Truth in Lending Act violations, breach of good faith, unjust enrichment, intentional infliction of emotional distress, intentional interference with economic advantage, Consumer Protection Act violations, and defamation) were knowingly and voluntarily released by [plaintiff] as part of the settlement agreement.” (Italics added.) Based on the findings of fact and conclusions of law, the Washington trial court entered a judgment dismissing all of plaintiff’s claims against defendants in the Washington action.

In March 2010, defendants in this action filed a first amended cross-complaint against plaintiff asserting causes of action for breach of the settlement agreement, fraud, slander of title, and intentional infliction of emotional distress. That same month, defendants in this action filed a motion for judgment on the pleadings as to plaintiff’s complaint arguing, inter alia, that the Washington trial court’s determination that the settlement agreement was fully enforceable collaterally estopped plaintiff from relitigating that issue in this action. The trial court denied that motion on the grounds that because plaintiff had appealed from the judgment of dismissal in the Washington action,

⁵ The Washington trial court also found that plaintiff planned to sue defendants at the time he executed the settlement agreement, notwithstanding the release, and concluded that plaintiff was estopped by his conduct from pursuing the claims in the Washington action. In addition, the Washington trial court concluded that all of plaintiff’s claims against defendants were frivolous.

the Washington trial court's determination concerning the enforceability of that settlement agreement was not final.

In September 2011, the Washington Court of Appeals issued an unpublished opinion affirming the judgment of dismissal entered by the Washington trial court. In November 2011, based on that opinion, defendants in this action renewed their motion for judgment on the pleadings as to plaintiff's complaint on the grounds, inter alia, that the release in the settlement agreement barred all of plaintiff's claims against them. Following a hearing, the trial court granted the renewed motion and subsequently entered a judgment on the complaint in favor of defendants in December 2011. In March 2012, plaintiff filed a notice of appeal from that judgment.

Following a bench trial on defendant's cross-complaint in August 2012, the trial court entered a judgment in favor of defendants on their cross-complaint. That second judgment provided, in pertinent part: "1. The court finds in favor of [defendants] and against [plaintiff] on their breach of contract, fraud, slander of title, and intentional infliction of emotional distress causes of action in their First Amended Cross-Complaint. [¶] 2. [Defendants] are entitled to judgment against [plaintiff] on their First Amended Cross-Complaint in the amount of \$644,000 due to the devaluation of the value of the Malibu, California real property due to [plaintiff's] actions^[6]; \$304,238 for money spent by [defendants] to maintain the Malibu property pending sale, for taxes, utilities, insurance and maintenance; \$180,574 in interest from the date of the breach; and \$100,000 to [individual defendant Wagner] in emotional distress damages. [¶] 3. By clear and convincing evidence the court finds [plaintiff] committed fraud when he entered into the settlement agreement dated October 16, 2008 because he had no intention to comply with the terms of the settlement agreement and he intended to initiate litigation

⁶ According to defendants, in May 2009, they had an offer to purchase the Malibu property for \$3,744,000, but, due to a baseless lis pendens filed against the property by plaintiff, that offer was withdrawn. Defendants thereafter sold the property in September 2010 for \$3,100,000. The \$644,000 component of the damage award represented the difference between the May 2009 offer and the ultimate sales price for the Malibu property.

against the [defendants] before he signed the settlement agreement. Not only did this result in the damages set forth above in Paragraph 2, but [plaintiff's] fraudulent conduct justifies an award of punitive damages in the sum of \$10,000, this being the amount that [plaintiff] OLLA has the ability to pay.”

On March 14, 2013, plaintiff, acting in *propria persona* (*pro. per.*), filed a notice of appeal from the judgment on the cross-complaint.⁷ On February 15, 2014 in our prior opinion in case no. B239702, this court affirmed the judgment on plaintiff's complaint.

On April 16, 2014, this court issued a briefing order directing the parties to address in their briefs the issue of whether plaintiff's failure to provide a reporter's transcript of the trial, or a suitable substitute, warranted affirmance based on the inadequacy of the record. (See Cal. Rules of Court, rule 8.120(b.) The parties addressed the issue in their briefs.

DISCUSSION

At the outset, we observe that we follow the law that plaintiff's status as a *pro. per.* litigant does not exempt him from the rules of appellate procedure or lessen his burden on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) We are required to treat *pro. per.* litigants as any other party, affording them “the same, but no greater consideration than other litigants and attorneys.” (*Ibid.*) The judgment is presumed correct on appeal, and it is the burden of the party challenging it, whether represented by counsel or in *pro. per.*, to “affirmatively demonstrate prejudicial error.” (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Although it is difficult to discern some of plaintiff's legal positions, we review them, to the extent they are not barred by a lack of an adequate record, as raising legal issues, which we review *de novo*.

⁷ As discussed below, plaintiff did not include the reporter's transcript of the trial proceedings or an agreed statement (Cal. Rules of Court, rule 8.134) in the record on appeal or move the trial court to use a settled statement instead of a reporter's transcript. (Cal. Rules of Court, rule 8.137.)

A. Collateral Estoppel

Plaintiff contends in his “Assignment of Error No. 1” that the trial court erred when it gave collateral estoppel effect to the Washington court’s finding that the settlement agreement was valid and fully enforceable in its entirety. According to plaintiff, the Washington court’s finding concerning the settlement agreement did not apply to his actions in California, he could not be sued in California based on actions he took in Washington, and the settlement agreement was otherwise against the public policy of California.⁸

In our prior opinion in case no. B239702, which we apply in full in this case, we held as follows: “‘Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]’ (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 795 P.2d 1223], fn. omitted (*Lucido*).)” (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.)

“Plaintiff maintains that the Washington trial court’s determination that the settlement agreement was enforceable did not satisfy the elements of res judicata or the collateral estoppel doctrine because the causes of action and remedies sought in the Washington action were different than the claims and remedies sought in this action. Even if the claims and remedies sought in the Washington action were different than

⁸ As with most of his other contentions on appeal, plaintiff did not support this assertion with a reasoned argument and citation to authority, a briefing defect that provides a separate basis upon which to affirm the judgment on the cross-complaint. (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956.)

those in this action, the dispositive issue litigated in the Washington action—the enforceability of the settlement agreement—was identical to the issue raised by plaintiff’s quiet title claim and defendants’ release defense in this action. A threshold and necessary issue to be determined in connection with that claim and defense was whether the settlement agreement and release were enforceable—the identical issue determined by the Washington trial court. That issue was actually litigated in the Washington action, at plaintiff’s request, during a three-day trial and it was necessarily decided in that action as reflected in the Washington trial court’s findings of fact and conclusions of law. And, because the Washington Court of Appeals affirmed the Washington trial court’s judgment, the determination of the issue was final and on the merits. Finally, the party against whom preclusion was sought here, plaintiff, was the same party against whom the Washington trial court determined the issue.

“Because the elements of the collateral estoppel doctrine were satisfied here, the trial court did not err in concluding that (i) plaintiff was prevented from relitigating the enforceability of the settlement agreement and (ii) the release in that agreement operated as a bar to all of the claims in plaintiff’s complaint because each such claim was based on the bridge loans and had been released as part of the settlement. We therefore affirm the order granting judgment on the pleadings and the judgment entered thereon.” (Feb. 14, 2014, unpub. opn. (case No. B239702) at pp. 11-12.)

Plaintiff’s argument that the Washington trial court’s findings on the settlement agreement cannot apply to actions he took in California regarding the Malibu property and that the settlement agreement was void as against public policy are essentially a repeat of the arguments he made in support of his prior appeal. Because we rejected those arguments in our unpublished opinion in that appeal, plaintiff cannot relitigate them in this appeal. The trial court previously gave collateral estoppel effect to the Washington state court’s findings, and we affirmed that ruling in our prior opinion. We adhere to and apply our reasoning and conclusions made in the prior appeal. Therefore, any claim in this appeal that seeks to challenge the binding effect of the release and settlement agreement is without merit.

As for plaintiff's contention that the trial court could not enter a judgment against him based on conduct in Washington, the merit, if any, to such a contention cannot be determined based on the record before us. Without the reporter's transcript of the trial, there is nothing to support plaintiff's assertion that one or more of the claims adjudicated against him were based on actions he took in Washington. We are therefore unable to reach the merits of this contention. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102.) Moreover, there is personal jurisdiction in California over plaintiff; there is no reason provided as to why a California court could not resolve claims based on personal acts in Washington. (See *Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 511-512.)

B. Insufficient Record

Plaintiff's "Assignment of Error No. 2" is comprised of five separate arguments: (i) the judgment on the cross-complaint was procured by a "fraud on the trial court" because defendants allegedly did not show that the witness who had offered to buy the Malibu property from defendants, and who later withdrew that offer based on plaintiff's "baseless" lis pendens, had the financial ability to buy the property for the offered \$3,744,000 and because there was no evidence that plaintiff recorded a lis pendens against the Malibu property after mid-2009; (ii) the trial court erred by failing to find that defendants were "estopped from their remedies" because they withheld from the bridge loan proceeds the monthly first mortgage payments for four months; (iii) the trial court erred by imposing punitive damages of \$10,000 against plaintiff because punitive damages may not be based on a breach of contract; (iv) the trial court erred when it excluded one of plaintiff's proffered exhibits—a first deed of trust and a first mortgage note—and when it admitted defendants' exhibit no. 1—a uniform residential loan application; and (v) the trial court did not have the legal authority to enter the judgment on the cross-complaint because the Washington court did not have personal jurisdiction over him and could not have entered a judgment in that state that would have any effect on his claims in this action.

1. *Judgment Procured by Fraud*

Plaintiff's contention that the judgment against him on the cross-complaint was procured by fraud is based on an alleged failure of proof concerning the prospective buyer's financial ability to close the purchase transaction on the Malibu property in or about May 2009, and his related assertion that there was no evidence that he recorded a lis pendens on the property at the time that the transaction failed to close. But without the trial exhibits and the reporter's transcript, we cannot determine those issues. Because the record is inadequate as to these issues, we do not reach them on appeal. We note that "fraud upon the trial court" can only be "established when 'extrinsic factors have prevented one party to the litigation from presenting his or her case.'" (*Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1110.) There is no showing here of such extrinsic factors.

2. *Insufficient Evidence of Breach of Contract by Defendants*

Plaintiff contends that the trial court erred when it failed to find that defendants were "estopped from [their] remedies" because defendants purportedly withheld payment of "the monthly first mortgage payments for four months." But there is no evidence in the record of any such payment withholding. Plaintiff did not include his exhibits in the record, and without the reporter's transcript of the trial, there is no way to ascertain whether this issue was even litigated during the trial. Due to the inadequacy of the record on this issue, we do not reach it on appeal.

3. *Punitive Damages*

Plaintiff contends that the trial court's award of punitive damages was erroneous because it could not be based on a breach of contract claim. But as the judgment on the cross-appeal quoted above makes clear, the punitive damages award was based on the fraud claim. Although an award of punitive damages cannot be based on a breach of contract claim, a tort claim, such as a fraud claim, can support an award of punitive damages. Punitive or exemplary damages, which are designed to punish and deter

statutorily defined types of wrongful conduct, are available only in actions “for breach of an obligation *not* arising from contract.” (Civ. Code, § 3294, subd. (a), italics added.) In the absence of an independent tort, punitive damages may not be awarded for breach of contract ““even where the defendant’s conduct in breaching the contract was willful, fraudulent, or malicious.” [Citations.]” (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 61.) Because the trial court awarded punitive damages on the independent tort of fraud, there is no merit to this claim. Plaintiff also asserts there was no evidence of his net worth upon which punitive damages could be based. (See *Adams v. Murakami* (1991) 54 Cal.3d 105.) Without a reporter’s transcript, we cannot determine what evidence was submitted on this issue. Moreover, we would not address this issue as it was raised for the first time in a reply brief. (*BCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18.)

4. *Exclusion and Admission of Proffered Exhibits*

Plaintiff maintains that the trial court erred when it excluded a first deed of trust and first mortgage note that he proffered, including documents that related to the rights of the first deed of trust holder, and when it admitted plaintiff’s exhibit no. 1, a uniform residential mortgage application. But the documents to which plaintiff refers are not in the record, and without the reporter’s transcript, we cannot determine whether one or more of those documents was offered, whether there were any objections to the documents, or whether the trial court made rulings on the admissibility of the documents. Thus, the inadequacy of the record on this issue prevents us from reaching the merits of this issue.

5. *Lack of Authority to Enter Judgment*

As he did on the first appeal, plaintiff contends that because the Washington trial court lacked personal jurisdiction over the parties, the trial court in this case erred by giving collateral estoppel effect to the findings underlying the Washington judgment.

In our prior opinion in this matter, we addressed and resolved the personal jurisdiction issue as follows: “Plaintiff’s contention that the Washington trial court lacked personal jurisdiction over defendants is also meritless. Plaintiff voluntarily filed suit in Washington and defendants voluntarily appeared in that action and participated in the litigation of, inter alia, the issue of the enforceability of the settlement agreement and release. Therefore, any contention concerning a lack of personal jurisdiction in Washington has been waived. (See *Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 512 [accepting service and making a general appearance in a case waives any objection based on personal jurisdiction]; see also *Kubey v. Travelers’ Protective Assn. of America* (1920) 109 Wash. 453, 456.)” (Feb. 14, 2014, unpub. opn. (case no. B239702) at p. 10.) Given our prior holding that the Washington trial court had personal jurisdiction over the parties, and our reaffirmation of that holding here, any claim in this appeal based on a lack of personal jurisdiction in Washington lacks merit.

DISPOSITION

The judgment on the cross-complaint is affirmed. Defendants shall recover their costs on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.